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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1930

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 14) is reported in 42 F. (2d) 596.

JURISDICTION

The judgment of the Court of Claims was entered on June 2, 1930. (R. 19.) The petition for a writ of certiorari was filed August 26, 1930, and the writ was granted October 20, 1930. (R. 21.) The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether a deed of real property made by the decedent should be construed to be a transfer intended to take effect in possession or enjoyment at his death; and, if so construed, whether Section 402 (c) of the Revenue Act of 1918 is constitutional in including in the measurement of the estate tax ~~placing an estate tax upon~~ such a transfer made by a deed executed prior to the enactment of the Revenue Act of 1918 but after the enactment of the Revenue Act of 1916 and the Revenue Act of 1917.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, infra, pp. 15–17.

STATEMENT

By deed dated July 1, 1918, the decedent, a resident of Illinois, conveyed certain real estate in Illinois to his wife. The deed contained the following terms (R. 12):

> First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other.

It is agreed that the conveyance was not in contemplation of death. (R. 12.) The grantor died intestate on September 17, 1919. (R. 11.) Upon auditing the returns of the administratrix, the Commissioner of Internal Revenue included in the

gross estate the value of the real estate conveyed on July 1, 1918. (R. 12.) A claim for refund was rejected to the extent of the tax arising from the inclusion in the gross estate of the value of the realty after having deducted the value of the life estate of the grantee. (R. 13.) The petitioners then brought suit in the Court of Claims on March 19, 1928. That court dismissed the petition on June 2, 1930. (R. 19.).

SUMMARY OF ARGUMENT

The transfer was one intended to take effect at death. The grantor's intent as expressed in the deed indicates that he anticipated a transfer of a substantial property interest at his death under that deed. He retained a reversion in fee in the realty, and conveyed to his wife a life estate together with a contingent remainder in fee to vest in her if she should survive him. Under the deed he controlled the insurance of the property even during her life estate. He owned the fee until his death and then his property rights passed to the grantee.

The statute, if construed to include in the gross estate the value of the realty less that of the grantee's life estate, is constitutional. No unexpected tax is imposed by the statute, for when the deed was drawn there was an estate tax in force. The transfer taxed occurred at the grantor's death after the enactment of the statute. Substantial property rights were transferred to the grantee at

the death of the grantor and there was no abuse of the conceded power of Congress to tax transfers at death in imposing an excise upon that transfer.

ARGUMENT

I

THE TRANSFER WAS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH

The Government contends that upon the death of the grantor in this case, a substantial property interest passed to his wife which she had never enjoyed before. The petitioners contend that after making the conveyance of July 1, 1918, their decedent had no legal estate in the land and no interest which could be included in his estate for Federal estate taxation.

The intent of the grantor as evidenced by the language of the deed of conveyance must control this question. By the first paragraph the grantee is given a life estate and the grantor retains the reversion of the fee. The limitations of the first paragraph are like those in the deed of realty construed in *Akers* v. *Clark*, 184 Ill. 136, 138–139. There the grant was in part:

> William Clark conveys and warrants to Mary J. Clark during her natural life and at her death to revert back to my heirs.

The court held that the wife, Mary, was given a life estate and that "the remainder, after the expiration of her life estate, under the law as well

as under the deed, reverted to the grantor or his heirs. * * * The fee remained vested absolutely in the grantor." Similarly in the instant case the deed leaves the fee in the grantor.

The second paragraph is not inconsistent with the first, but creates a contingent interest for the grantee to follow her life estate. Under it "upon condition and in the event that the said grantee shall survive the said grantor," she shall at the moment of survival and upon that contingency only be seized in fee of the property. The second paragraph of the deed grants to her, in addition to the life estate given her by the first paragraph, a remainder in fee, contingent upon her surviving the grantor. The words *"then and in that case only"* indicate that she is intended not to get the fee upon delivery of the deed, but only at a future date and only if she outlives the grantor.

The petitioners contend that under this second paragraph the wife is given a determinable fee and the grantor a mere possibility of reverter. This ignores the express language of the first paragraph and overlooks the fact that the wife's remainder interest is contingent. In Gray's *Rule Against Perpetuities,* 3rd Edition, it is stated in paragraph 113, p. 94:

> A remainder is created by the livery of seisin of the particular estate; if it is not ready to come into possession whenever and however the previous estates determine, it is

a contingent remainder. A contingent remainder is, in truth, not an estate, but a possibility of an estate; its becoming an estate depends upon the condition precedent of the first contingent fee simple limited not vesting; while a reversion is independent of the ownership created by the livery, it is an actual estate, and, therefore, any condition affecting it is a condition which, as to it, is subsequent.

In *Stevens* v. *Van Brocklin*, 295 Ill. 434, the Supreme Court of Illinois applied this rule to similar facts and held contingent a remainder which did not stand ready to take effect in possession whenever the preceding freehold estate determined. In the instant case, the only estate ready to come into possession upon the termination of the wife's life estate was the grantor's reversion. The wife's remainder interest was contingent because, under the express terms of the deed, it could not come into possession upon the termination of her life estate unless the grantor were then dead.

The cases relied upon by the petitioners are of conveyances and devises under limitations different from those in the deed in the instant case.

In *Stoller* v. *Doyle*, 257 Ill. 369, the court construed the instrument there under consideration as conveying an estate in fee subject to a condition subsequent. In the instant case the deed does not convey a fee to the wife subject to a condition subsequent. It conveys to the wife a life estate and

reserves to the husband the reversion in fee. The passing of the fee from the husband to the wife can only take effect upon his death and her ultimate estate in fee is expressly dependent upon the happening of that event as a condition precedent.

But regardless of the correct terminology of the estates created by the conveyance in the instant case, we submit that until his death the grantor retained a real and substantial interest in the property. Under the third paragraph of the deed, if the insured buildings on the land were destroyed, "the insurance moneys" were to be put back into improvements on the realty or *with the grantor's written consent* invested so that while the grantee received the income for her life, the capital would belong to that one "who shall survive the other." The fire insurance was to be taken out in the names of both the grantor and grantee in companies acceptable to the grantor. The language of the conveyance, taken as a whole, indicates an intent by the grantor to keep a very genuine interest in the property during his life. He did not intend that his wife could convey away the fee, a power which she would have under the petitioners' construction of the deed as vesting her with a fee simple determinable. See *Friedman* v. *Steiner*, 107 Ill. 125, 133, where the court stated that the holder of the determinable fee was "clothed with power to convey in fee simple absolute."

The petitioners rely upon *May* v. *Heiner*, 281 U. S. 238. In that case the grantor retained a future life estate only. Upon her death her life estate was obliterated. No new estates were created, nor did the fee shift from one person to another. This Court held that there was no transfer intended to take effect at death. The facts in the instant case are totally dissimilar. The grantor retained the fee; the grantee had no estate at all, but merely a possibility of an estate, a contingent remainder. Upon the death of the grantor, the fee simple passed from him to his wife, and her contingent remainder became vested. A transfer of property from the dead to the living then took place.

The same essential facts distinguish the instant case from *Nichols* v. *Coolidge*, 274 U. S. 531, *Shukert* v. *Allen*, 273 U. S. 545, and the five trusts involved in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339. In all of those cases the nontaxable transfer was single and complete, leaving no interest in the grantor under the terms of the conveyance. The property could not revest in the settlor. In the instant case, like that of *McCormick* v. *Commissioner*, No. 542, October Term, 1930, the grantor or settlor retained a reversionary interest and expected to keep the fee or regain the corpus of the trust unless a contingency occurred—namely his (or her) death prior to that of the grantee or the other beneficiaries. The interests are somewhat similar

to those in the two trusts in *Reinecke* v. *Northern Trust Co., supra,* where the settlor retained a power to revoke and regain the whole corpus until his death, and this Court held the transfers taxable. Until his death the grantor in the instant case retained control over the property and anticipated the return of the entire estate to him if he survived his wife. His death was the generating source of important accessions to the property rights of the grantee. Such a transfer is one intended to take effect at death within the meaning of Congress in the taxing statute. In reaching this conclusion the court below stated (R. 15–16):

> Until his death, however, the transfer was incomplete. Until that time the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest. Until his death the possession or enjoyment by the decedent's wife of his vested remainder in fee was postponed. The decedent's death was the event which made the transfer complete and effective, and secured to Etta M. Klein the possession and enjoyment of the property contemplated by the statute. The acquisition by the wife of the full benefits of ownership of interest which remained in the decedent became complete only upon his death. It was, therefore, a transfer at his death. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339;

McCaughan v. *Girard Trust Co.*, 11 Fed. (2d) 520; *Dean* v. *Willcuts*, 32 Fed. (2d) 374. We are of opinion, therefore, that the decedent had an interest in the property which was the subject of the instrument creating a life estate in his wife, the transfer of which interest took effect and was complete at his death, and that the value of this interest was a proper item to be included in the gross estate.

II

SECTION 402 OF THE REVENUE ACT OF 1918 IS NOT UNCONSTITUTIONAL WHEN CONSTRUED TO TAX THE TRANSFER

The petitioners contend that because the taxing statute was enacted after the delivery of the deed it is unconstitutional and in violation of the Fifth Amendment in that it is arbitrary and capricious in taxing the transfer which under that deed took effect on the grantor's death in 1919 after the passage of the statute imposing the tax.

The tax was assessed upon the value of the real estate diminished by the value of the grantee's life estate. In other words, the transfer occasioning the tax was the transfer on the grantor's death of his reversionary interest in fee to the grantee. While this transfer did not antedate the taxing statute, it was provided for irrevocably by the deed of July 1, 1918. But, at that earlier date the grantor must have anticipated a tax upon this future transfer. No new or unexpected tax is im-

posed upon an act nontaxable when done, as in *Untermyer* v. *Anderson,* 276 U. S. 440. The deed was dated July 1, 1918, almost two years after the first estate tax was imposed by the Revenue Act of 1916. Section 402 (c) of the 1918 Act, the statute in force at the grantor's death on September 17, 1919, is an exact reenactment (except for its parenthetical clause "whether such transfer or trust is made or created before or after the passage of this Act") of Section 202 (b) of the 1916 Act, *infra,* pp. 15–16. The Government's position on this question is fully set forth in its brief in No. 87, October Term, 1930, *Milliken* v. *United States,* at pages 9–15, and, therefore, is not repeated here. Moreover, the Government's position in the present case is even clearer than in the *Milliken case,* for in the present case the deed was executed after Section 201 of the Revenue Act of 1916 had been amended by Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and after the enactment of Section 900 of the Revenue Act of 1917, c, 63, 40 Stat. 300, 324–325. Under these Acts the rates in force at the time the deed was executed were substantially the same as those in force at the date of the death, so that the question of retroactivity is practically removed.

Moreover, we question whether the date of the deed is material. In *Reinecke* v. *Northern Trust*

Company, 278 U. S. 339, the tax upon the transfer at death of property conveyed under revocable trust instruments drawn in 1903 and 1910 was upheld in spite of the fact that the trusts were created before the passage of any statute imposing an estate tax. The excise tax in the present case is upon a transfer made after the enactment of the taxing statute. The Court of Claims decided such a tax was constitutional and not arbitrary, regardless of the date at which the ultimate transfer at death had been unalterably arranged, saying (R. 18, 19):

> The date of the execution of the trust, or conveyance, is not controlling but the important thing is whether under such instruments there remains in the decedent any interest in the property which passes at his death. In this case we think there was such an interest.

In *Coolidge* v. *Long*, 167 N. E. 757, now pending in this court as Nos. 33 and 34, October term, 1930, the Supreme Judicial Court of Massachusetts held valid a succession tax upon the ultimate transfer of the corpus of a trust created before the enactment of the State inheritance tax law.

Since the tax is laid upon the "privilege of transmission," a tax upon the property interest transferred upon the grantor's death in the present case is within the meaning of the statute and the power of Congress. As in *Tyler* v. *United States*,

281 U. S. 497, where property held by tenants by the entirety was included in the gross estate of the decedent, death "brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit,) to be measured in whole or in part by the value of such rights."

CONCLUSION

The opinion of the court below is correct and its decision should be affirmed.

Respectfully submitted.

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FEBRUARY, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provides in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages.]
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two

> years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, amended Section 201 of the Revenue Act of 1916, by increasing the rate of the tax.

Section 900 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 324, imposed a further tax in addition to the tax imposed by the Revenue Act of 1916, as amended by the Act of March 3, 1917, *supra*.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097, provides in part:

> SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages substantially the same as the tax imposed by the Revenue Act of 1916 as amended by the Act of March 3, 1917, and by the Revenue Act of 1917.]
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined

by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

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